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THE RULE OF SCRIP DIVIDEND GOING TO LIFE TENANT UNDER A WILL.

The case of Bankers' Trust Co. v. R. E. Dietz Company, 124 N. Y. Supp. 847, decided by New York Supreme Court in Appellate Division, is very suggestive of mitigation in the rule which gives to life tenants under a will all and every kind of dividend, whether ordinary or scrip or in reduction of surplus, afterwards declared by the directors of a corporation.

Thus it appears that the Robert E. Dietz Company was composed of Robert E. Dietz, the holder of 600 shares, and his two sons, Frederick, the owner of 250, and John E., the owner of 150 shares, of the par value of $100. making thus a capitalization of $100,000.

The father dying in 1897, left to his widow for life the income of his shares with remainder to five children. One of these children married and predeceased her mother, as also did her husband shortly afterwards. By the will of her surviving husband, the one-fifth vested interest in remainder in 600 shares of the stock passed to others than members of the Dietz family.

The directors of the Dietz company, prior to the widows' death, first declared a scrip dividend of 340 per cent, then another scrip dividend of 200 per cent and a third scrip dividend of 180 per cent, or, in all, 720 per cent, none of which was to be paid in cash, but all to be a charge upon the assets of the company and to draw interest, payable out of the future profits of the company. The remaindermen attacked these declarations of dividends, not upon the theory of the surplus above capitalization not authorizing them, but upon the claim, that they were not declared in good faith as an administrative measure in the management of the corporation, but solely to prevent 120 shares of its stock going in their full integrity and value to holders outside of the Dietz family, there being by the arrangement a charge put upon the working operations of a company, which otherwise had no indebtedness at all.

The court, by a ruling of four to one, held that the complaint was demurrable, apparently because of its being the absolute right of a corporation to declare a scrip dividend when it has used profits in improvements. The dissent went on the theory, that, notwithstanding such right, yet, it being averred there was a conspiracy to depreciate the stock and that this was the sole purpose of declaring the scrip dividends, the action was maintainable.

While it seems to us that the dissent was well based, yet it is also to us suggested by this case that testamentary intent ought to be recognized as having some play in an issue of this kind.

It may be, and probably is, true that this intent should not interfere with any honest purpose in corporate directors declaring or not declaring scrip dividends and charging them upon the corporation because of improvements, or paying dividends in reduction or exhaustion of surplus, yet to whom, wholly or partially, such dividends should go ought not to be by any hard and fast rule, but should depend upon the intent of testators or settlors.

Thus it seems in this case, that the testator naturally intended that the large dividends upon a stock that could stand a scrip dividend of more than seven times its par value, because of improvements built up out of profits, should suffice for his widow during her life and the stock should go to remaindermen as enjoyed by her.

It looks like it had become a permanent policy of this company to build up a business safely against disaster, and that the intent of him who held sixty per cent of the stock was that this policy was to continue, or at least such was his expectation in regard to the beneficiaries of his bounty.

While he took no specific means to enforce this policy, yet, if he meant that thus his widow and the remaindermen were to

participate, it ought not to be allowed to directors, though their discretion be unobstructed in the management of this corporation, to change thus radically the intent of the testator. Strangely to us, however, neither the majority nor minority opinion alludes to this feature.

Conversely, it might be argued, that a life tenant should have some recourse, were a policy in declaring dividends radically changed so as to diminish her anticipated income by placing inordinate amounts in improvements or carrying them to surplus.

It again may be said that policy by directors ought not to be interfered with, but, if testamentary intent could be spelled out against income being diminished, a court should allow a charge upon the principal that would otherwise go to remaindermen unimpaired. We do not remember seeing this aspect of the question considered in any case, but why any board of directors may reduce or increase anticipated income and by doing so defeat or seriously obstruct testamentary intent we are unable to understand.

NOTES OF IMPORTANT DECISIONS

NEGOTIABLE INSTRUMENTS LAW—PARTIAL ASSIGNMENT OF NOTE SECURED BY MORTGAGE NOT INDORSED ON NOTE.—The Supreme Court of Kansas considers a case where the maker of a note secured by a mortgage upon real estate paid it at maturity to the holder of the note, there not appearing either on the note or mortgage any indorsement of any transfer. Offenstein v. Weygandt, 132 Pac. 91.

At the time of payment the mortgage was released in due form and taken to the register of deeds to be recorded. He refused to accept it for record, because there appeared of record an assignment executed upon a separate paper of an one-third interest in the mortgage. The mortgagors thereupon sued the original mortgagee and recovered judgment for $250.

On appeal this was reversed, because the negotiable instruments law required that indorsements affecting a negotiable note "must be written on the instrument itself or upon a paper attached thereto." It is difficult to see why this provision should not be deemed mandatory, notwithstanding any constructive notice thought to arise out of the record of the supposed assignment. A mortgage is but security for a debt. The note represents the debt it secures, and as long as the note is negotiable, any taker of it before maturity ought to be protected. When a note is paid there is nothing remaining to be, by the mortgage, enforced.

The court says: "Since the assignee never became a holder in due course, the (mortgagor plaintiffs) could have interposed the same defense of payment in an action brought against them by the assignee as if the defendant himself had sued them." Then it suggests that the plaintiffs should have sued assignor and asignee and asked for a decree canceling the mortgage. We see little necessity for this. If the note was validly paid, the proper action would have been to compel the register to record the release. The assignee would have been the proper party to sue the original mortgagee. It would be evident that had the original holder transferred the note before maturity by proper indorsement, transferee would not have been prevented from collecting. If so, why are not the makers fully protected in paying the original holder? If they are, why should they be suing assignee or assignor?

INTERSTATE COMMERCE — STREET RAILWAY CROSSING STATE LINES.—In 74 Cent. L. J., 43, this journal criticised decision by Commerce Court holding that a street railway for passenger service only across the Missouri river between Omaha and Council Bluffs was within the control of the Interstate Commerce Commission under the Commerce Act of 1887. We now see that this holding is by the Supreme Court reversed. Omaha & C. B. St. Ry. Co. v. Interstate Com. Com., 33 Sup. Ct. 890.

Mr. Justice Lamar, speaking for a unanimous court, in reasoning whether the word "railroad" includes street railroad says: "Ordinary railoads are channels of interstate commerce. Street railroads, on the other hand, are local, are laid in streets as aids to street traffic and for the use of a single community, even though that community be divided by state lines, or under different municipal control. When these street railroads carry passengers across a state line they are, of course, engaged in interstate commerce, but not the commerce Congress had in mind when legislating in 1887. Street railroads transport pas-

sengers from street to street, from ward to ward, from city to suburbs, but the commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight 'between states,' 'between states and territories,' 'between the United States and foreign countries.' * * * Every provision of the statute is applicable to railroads. Only a few of its requirements are applicable to street railroads."

The justice plainly considers the act as having only a bearing on transportation as carried on by certain instrumentalities, and not in a broad way regulatory of all commerce between the states. In answer to the contention that interurban electric railroads had grown up since the act of 1887, carrying freight, passengers and express, it was said no such case was before the court, but there is strong intimation that such a railroad would be deemed to be within the Commerce Act.

RECENT DECISIONS IN THE BRITISH COURTS.

Attention has been called in several English journals to the Bombay case of Jehangir v. B. B. & C. I. Ry. (Jan. 16, 15 Bombay Law Reporter 252), where the plaintiff, a passenger, had his arm outside the window while the train was running through a station and passing a stationary train. A door in the latter train had been left open, and caught the plaintiff's arm with serious results. In putting his arm out he disregarded a conspicuous notice in three languages. The court declined to follow a previous ruling in the same jurisdiction that the smallest extension of a passenger's limbs—say one finger—is contributory negligence as matter of law. But in this case a man of ordinary prudence ought to have perceived that a train was standing on the next line of rails, and there was ample time for the plaintiff to draw in his arm (as any prudent man would have done) before the collision with the open door occurred; and the plaintiff, by his own account, had been most "grossly careless and indifferent to danger." The company's original negligence in leaving the carriage door in a standing train open was admitted, but it was held that the plaintiff's damage was due to his own contributory negligence, and the suit was dismissed; but, partly out of compassion for the plaintiff's sufferings and expenses and partly to mark disapproval of a defense which the court thought rather shabby, costs were disallowed.

Lord Hunter in Craig Line Steamship Co. v. North British Storage Co., 1913 1 S. L. T. 453, discussed and examined the authorities as to the question of onus of proof in a claim by consignees against shipowners for short delivery of cargo. The common-law rule is that a shipmaster's signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the onus of falsifying them and proving that he received a less quantity of goods to carry than is thus acknowledged by his agent. In the case mentioned the bills of lading contained a statement to the effect that the "weight, quality, quantity and contents," were unknown. Lord Hunter, after a full examination of the decided cases, found that these words shifted the onus and put on the consignee of the cargo the burden of showing that the shortage was due to the fault of the shipowner. The case was accordingly dealt with at the proof on that footing.

In re Seymour L. R. 1913 1 Ch. 475, the question was, what amounts to the delivery of a deed. A lady's attorney executed a deed of gift on her behalf which was outside his power of attorney. The deed was submitted to the lady who expressed her full approval of it. Did this expression amount to a delivery by herself of the deed? A large amount of ancient learning was cited in argument, and yet the point was settled by authority, if ever a point was, namely by the decision of Bayley J., in Doe v. Knight, 5 B. & C. 671, who there says, that the sole question in such a case is: Did or did not the maker of the deed do or say something which showed that he intended the instrument to operate at once? No formal act is necessary. As Coke says, "A deed may be delivered by words without actual touch, or by touch without words." Here the lady expressed approval of the deed, and declared more than once that the property it purported to dispose of belonged to the donee under it.

In Stocks v. Wilson, 1913 2 K. B. 235, Lush J. decided several points on the attempted purchase of goods by an infant falsely repesenting himself as of full age: (1) Although there is no contract, property passes by delivery of the goods with intent to pass it, and the fraud does not effect this; therefore there is no conversion. But the goods or their price can be followed in the hands of the infant when of age, and recovered on equitable principles. This appears to be well justified by authorities beginning a long way back. (2) The fact that an entire agreement for sale

to an infant includes some things which may be necessaries will not make it valid if it includes a substantial quantity of things not necessary. This is obvious good sense, and the contrary was not seriously maintained. As usual in such cases, the jury had boldly found that a mixed lot of curios were necessaries for a youth who said (it seem untruly) that he was going to be married.

In the celebrated leading case of Rylands v. Fletcher, 1868 L. R. 3 H. L. 330, the question was left undecided, whether a man could be excused from liability for damage caused by the escape of something dangerous unless impregnably secured, which he had brought for his own purpose on his land, if the escape was in consequence of *vis major* or the act of God. The answer has now been given by Rickards v. Lothian (L. R. 1913 A. C. 263), which affords protection to the harbourer when the release of the dangerous thing is effected by the act of a third person. Although there is nothing novel in the decision, the two cases form a convenient sequence on this branch of the law of negligence, for they define the primary hazard, and the exemption where *vis major* or some act either of mischief or enmity of the third person has destroyed what otherwise would have been safeguards against peril.

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FRANCHISE IN CONDUCTING THE BUSINESS OF INSURANCE AND REGULATION OF ITS RATES.

Introductory: A threatened exodus of foreign insurance companies from the State of Missouri, because of unwelcome legislation of an anti-trust character, has caused me to turn to the question of the nature of the insurance business and whether or not regulation may and should, or not, go beyond what heretofore has been prescribed and extend to it, as to railroads and other public utilities, the fixing by law of its rates. Regulatory provisions have grown apace with development of the business, and their desirability has changed to necessity in the carrying on of trade.

Nature of Insurance Business—Juris Publici: One may readily imagine, that. while the ruling in Paul v. Virginia[1] could not have been a whit more decisive than it was in regard to the power of a State to exclude a foreign insurance corporation from its borders, if it chose, yet the argument now would take on an additional tone were the question one of first impression. Now there would appear a note not then touched upon, and extending beyond expressions made use of by Justice Harlan,[2] and quoted by Associate, now Chief Justice, White,[3] where the question was of subsequent regulatory legislation unconstitutionally impairing or not charter powers previously granted. Justice Harlan said: "It would be extraordinary, if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals and the prosperity of the people, might not, where unrestrained by constitutional limitations upon its authority, provide by reasonable regulations, against the misuse of special corporate privileges, which it has granted, and which could not, except by its sanction, express or implied, have been exercised at all."

That it may not be thought that the nature of the insurance business under a franchise was not differentiated in the mind of the learned Justice, I call attention to what he says in the next preceding sentence in which he urges that, if subjection to regulation "be not necessarily implied, then the creation of corporations, with rights and franchises which do not belong to individual citizens may become dangerous to the public welfare through the ignorance, or misconduct, or fraud of those to whose management their affairs are entrusted." The case in which Justice Harlan was speaking for an unanimous court concerned a life insurance company, and his language was adopted as controlling in a fire insurance case, the court, on trial of the latter case declining to hear the Attorney

(1) 8 Wall. 168.
(2) Chicago L. Ins. Co. v. Needles, 113 U. S. 574.
(3) Eagle Insurance Co. v. Ohio, 153 U. S. 446, 38 L. ed. 778.

General, for defendant in error, because of the complete way in which the question before it was covered by the Needles case *supra*.

Franchise Evolved from Statutory Regulation: The latter of these cases was decided May 14th 1894, affirming the Supreme Court of Ohio,[4] which mainly relied on the Needles case, also saying the doctrine is on the principle of visitatorial power as decided to exist with regard to banks.[5] Before this affirmance, however, the Ohio Supreme Court spoke more pointedly of the nature of insurance contracts as contradistinguished from their status at common law.[6] Quoting approvingly from Spelling on Extraordinary Relief, Sec. 1087, it said: "There was no class of business, the transaction of which as matter of right, was better recognized at common law, than that of making contracts upon the lives of individuals. But now, by statute, in almost, if not quite, all the States, stringent requirements as to security of the persons dealing with the insured and the making and filing reports with public officers for public information, are provided and must be strictly observed and complied with before any person, association or corporation may make any contract of life insurance. The effect of such statute is to make that a franchise which previously had been a matter purely of private right." Of course, this assumes that insurance contracts are transactions within reach of the police power of the State and only permissively the subject of private contract, in an exclusive way, but the court had just said that statutory provisions in Ohio taking control of the business of insurance were "reasonable and just," because they "were adopted for the laudable purpose of protecting the public against imposition by unreliable and untrustworthy companies and associations." Further it was said that: "Where, by statute, the legal exercise of a right, which at common law was private, is made to depend upon compliance with conditions *interposed for the security and protection of the public** the necessary inference is that it is no longer private, but has become a matter of public concern, that is, a franchise, the assumption and exercise of which without complying with the conditions prescribed would be a usurpation of a public or sovereign function."

Limitation on Individual Right to Carry on Insurance Business: Within less than twenty days after the Federal Supreme Court affirmed the Ohio court, the question of the right of an association of individuals to conduct an insurance business without authority expressly conferred, as required by statute, came before Pennsylvania Supreme Court.[7] The statute provided: "That it shall be unlawful for any person, partnership or association to issue, sign, seal or in any manner execute any policy of insurance, contract or guaranty against loss by fire or lightning without authority expressly conferred by a charter of incorporation, given according to law," it also being declared that every such policy, etc., should be void. The statute was held a valid exercise of police power in a criminal prosecution against an individual for its violation. The court reasoned that: "In view of the magnitude and nature of the insurance business, it is apparent that the public is largely interested in all that relates to it. The security of policy holders requires, first permanency in the custodian of the funds gathered from them and on which their indemnity in case of loss depends; second, an honest and competent administration of these funds; third, restraint against the division of the profits of the business, whenever such division would injuriously affect the security of

(4) State ex rel. v. Eagle Ins. Co., 50 Oh. St. 252, 33 N. E. 1056.
(5) Com. v. Farmers' and Mechanics' Bank, 21 Pick. 542; Opinion of Justices, 9 Cush. 604.
(6) State ex rel. v. Ackerman, 51 Oh. St. 163, 37 N. E. 828, 24 L. R. A. 298.

*Italics are mine.
(7) Com. v. Vrooman, 164 Pa. St. 366, 30 Atl. 217, 25 L. R. A. 250.

policy holders. How are these safeguards to be obtained? There is but one way and that is by means of general laws regulating the insurance business." It was then said there is no attempt to give to corporations as such a monopoly of the insurance business, but the requirement of a charter of incorporation was but a method of subjecting the business to visitatorial power of the State and no individual was forbidden to engage in it, if "the preliminary qualification necessary for all alike" is complied with.

Same: About two years later the question of an individual or association of individuals having the constitutional right to engage in insurance business without compliance with statutory conditions, came before a New York court,[8] and, a very elaborate opinion was rendered. Among other things it was said: "As the business of insuring lives, property, credits and fidelity of conduct has become of such large public concern, in connection with the business enterprises and activities of the State generally, such business has essentially become one of public character, and it has been found necessary by the legislature to guard and protect the people of the State in their dealing with the persons and the corporations assuming to act as insurance companies, in the same manner that it has been found essential to deal with the business of banking. . . . It has been held repeatedly that the State has the right to regard the business of insurance as one dependent upon the exercise of a franchise, which the State has the right to give and to withhold. This franchise right has grown up from a small beginning, from necessity, but it is not a departure from the general rule characterizing the meaning of the term franchise. It is simply the modern application of the principle governing such privileges applied to new emergencies. Whatever is of large public concern, so that a want of regulation and control will injuriously affect the public in its general interests, may be the subject of a franchise. . . . The power, therefore, to regulate even to the extent of prohibiting the business of insurance, by acts of the legislature, does not depend exclusively upon the right of the legislature to subject corporations, as such, to statutory control, but extends beyond to the transaction of business recognized as such to be within the discretionary control of legislative action." Here is seen to be the same idea, in other terms, expressed by the Pennsylvania court, to-wit: That the law did not aim at distinguishing corporations from individuals, in their right to make contracts, but to put the making of such contracts under more efficient control by the State, and make their obligations the more secure.

Insurance Private Matter at Common Law: To bring out the idea more thoroughly of the change wrought in conditions from what they were at common law, wherein insurance contracts were regarded as a private matter, it is well to revert to State v Ackerman *supra*, and quote as follows: "Insurance in its early existence, when the nature of the risks assumed were few and the amount of business small, was done chiefly, if not entirely, by individuals. But in more recent times it has been extended until it embraces almost every kind of risk and has grown to such proportions that it enters into every department of business and affects all classes of people and their property, and has, in consequence, everywhere become the subject of legislative regulation and control. The several States have enacted laws designed to place the business within their limits on such substantial basis as will afford adequate protection to the citizens and their property. There can be no doubt of the power of the State to do so."

Right of Regulation Goes Beyond Protection of Policy Holders: So far it has appeared that the courts have reasoned more on the theory of protection to the public, so far as policy holders are con-

(8) People v. Loew, et al., 44 N. Y. Supp. 42, 78 N. Y. State Rep.

cerned, the interlacing nature, so to speak, of these contracts, in their aggregation, having an intimate relation to the public welfare. But it has been ruled that the police power of the State with respect to insurance contracts does not at all exhaust itself in seeing that insurers shall be subject to regulation so that policy holders will be secure, but the form and tenor of policies may be prescribed. Thus instead of open policies or valued policies, "both of which are sanctioned by the practice and law of insurance," the law may confine insurance to the latter.[9] Justice McKenna reasoned that such a statute tended to make "policies true contracts of insurance, not seemingly so, but really so; not only when premiums are paying, but when loss is paid. The State surely has the right to determine that this result is desirable, and to accomplish it even by a limitation of the right of contract claimed by plaintiff in error." In a later case,[10] confirming the Daggs case, it was said: "We sustained the statute independently of the ground that it was a condition of the permission of the company to do business in the State." So also have statutes nullifying conditions of forfeiture inserted in policies been upheld.[11] Other examples of regulatory enactment infringing on the free right of contract might be given, but what has been shown may suffice for the conclusion, that regulation may go in regard to insurance, as a matter *publici juris*, to whatever concerns the integrity of the obligation thereunder and the maintenance of its security. Does the fixing of rates come within statutory regulation?

Distinction between Insurance Company and Public Service Company: An insurance company, though its business be of such public concern as to make it subject to regulation and control, being the exercise of a franchise, possibly, may not be deemed a public utility company, as is a common carrier or a water or gas company, and its purpose may not be in a constitutional sense a public one so as under any American constitution to justify any statute giving right of eminent domain. Neither may it be thought that the obligation, incurred by the exercise of its franchise, compels it to accept any application for insurance that may be tendered. There are too many elements in a contract to distinguish it from the mere furnishing of service by public utility companies. There, too, is the moral hazard always present which every contracting party should be left free to estimate for himself. Then there are dissimilarities between individuals and dissimilarities in properties of like value, because of environment, the nature of occupancy and other things, which in fair right of contract in each transaction ought to be allowed to have proper consideration. It might as well be said that a bank should lend at a fixed rate of interest to all applicants for loans, provided that they show themselves to be presently solvent and of good reputation, even though the lenders were informed that the money was to be invested in a business which promised, in the lender's opinion, to bring on the borrower's bankruptcy.

Feasibility in Fixing Rates by Law and Statutory Power: But all of this may be said to go no further than to prove that a statute prescribing a fixed rate within a State, according to such classification as it might employ, would be so impracticable as not to free an insurance company from reasonable fear of having the earnability of its investment, if not the investment itself, confiscated. I take it that it is well established, so far as public utility companies are concerned, that they may successfully object to statutes requiring them to supply service at confiscatory rates, and if they may so also might an insurance company, if it be conceded that its rates may also be prescribed by law.

(9) Orient Insurance Co. v. Daggs, 172 U. S. 557.

(10) N. Y. Life Ins. Co. v. Cravens, 178 U. S. 389.

(11) Equitable Life Assur. Society v. Clements, 140 U. S. 226. See also Opinion of Justices, 97 Me. 590, 55 Atl. 828.

If, however, it is practicable through statutory authority, say by a commission, to prescribe, amend and change rates, it is not difficult to advance to the position that legislative discretion in doing this would be upheld. There are reasons for the doing of this quite similar to those obtaining in regard to public service companies, when it is demonstrated that all act by grace of franchises. As has been pointed out in decision, the interests and property of practically the entire public are affected, whether all be insured or not. Insurance is an article of public necessity, and, what is more, the public is sometimes as greatly interested in its not being supplied as in its being supplied, because of the menace to others it may contain. It is interested in its being uniform in price under uniform conditions, because it is part of the expense in the conduct of trade, just as much as charges for service by utility companies. Experience is the only basis for a fair estimate of its cost, and, therefore, it is fully as fair and reasonable to prescribe rates as in rates for service, and fairer too, I think, because there are no physical difficulties varying conditions between insurance companies, as there may be between public service companies. Every expert in insurance may read experience tables in the same way and arrive at the same rate as to the cost of insurance. Upon two public service companies the compensatory rate may differ, because of the difference in cost of plant and equipment. Different capitalization in insurance business does not affect this question at all. One company merely handles more money than another and is allowed to more greatly extend its insurance. If there is success in one company and failure in another, that is merely management and mismanagement. But regulation principally is aimed at the latter. If uniform rates promote good management, and this insures security for policy holders, decision I have instanced says uniform rates are proper. But even if they may not be seen to promote good management, still if they do not militate against security, police power, not threatening confiscation, seems to me to have the right to prescribe them. Progressive regulatory legislation of insurance companies seems to me on the way to this result.

Concluding Remarks.—The history of insurance shows that, so far as risks on lives are concerned, tables of expectancy are taken as the basis for rates, and yet it is a well-known fact that these tables more aptly apply in some latitudes than others. Each state should be allowed to select its own table of expectancy. Furthermore, each state should be supposed to be fully capable, through commissioners making themselves expert on the subject, of judging about the influence on longevity of particular avocations and trades in its borders and its judgment, having to be impartial as to the rights of insurance companies to earn fair compensation and the people to be accorded fair rates, ought to be deemed superior to that of insurance companies fixing rates, possibly as high "as the traffic will stand." The same observation, *mutatis mutandis,* is applicable to fire, indemnity, accident and fidelity insurance. The public only took over rate regulation of public service companies, because of the maxim that no one should be a judge in his own case. A franchise owned by an insurance company is as much subject to this maxim as where it is owned by a common carrier. When the people are convinced that insurance rates are but justly compensatory and uniform, a more general resort to insurance will be the result. At the same time, legitimate changes in plans of insurance receiving the approval of lawful boards will spur the business; but, principally, wild cat enterprise will be eliminated, than which no business has produced a larger crop than insurance. Large business as the public's guardian is being relegated to memory.

N. C. Collier.

St. Louis, Mo.

HUSBAND AND WIFE—CONTRACTS FOR NECESSARIES.

JAMES McCREERY & CO., v. MARTIN.

Court of Errors and Appeals of New Jersey.

July 2, 1913.

87 Apl. 435.

A husband living with his wife, who supplied her with necessaries suitable to his or her position, or furnished her with money with which to pay therefor, was not liable for the price of goods purchased by her on credit, although of such a character as to constitute necessaries, if she had not already been supplied therewith, where he neither authorized nor ratified the purchases, but, on the contrary, forbade her purchasing on credit.

GUMMERE, C. J.: (1) McCreery & Co., the plaintiffs below, by this suit seek to compel the defendant Luther Martin to pay for goods purchased from time to time by the defendant's wife at their store in New York. The goods were purchased by Mrs. Martin while she and her husband were living together, and constituted the first credit dealings with the plaintiffs, either of herself or her husband. The plaintiffs' claim is that the goods purchased were "necessaries," and that, being such, the wife by reason of the marital relation had a right to pledge her husband's credit for their payment.

The defendant sought to avoid liability by showing that he furnished his wife from time to time during the period in which these purchases were made with moneys sufficient to pay for all necessaries required by his wife and family, and suitable for their position, and, further, that he had expressly forbidden her to run accounts against him in department stores. The store conducted by the plaintiffs came within that description. The evidence tending to establish this defense was overruled by the court. At the close of the case the court charged the jury that if they believed the articles which were the subject-matter of the suit were of the kind and character ordinarily used for domestic purposes in the household of the defendant, and that they were purchased by the wife while living with her husband, then the defendant was liable therefor, whether the goods were actually needed or not; that it was sufficient that the goods purchased were of the general character and nature used in the defendant's household. The court refused to charge at the request of the defendant that a husband discharges his marital obligation to his wife (i. e., the obligation to furnish her with necessaries) either by supplying them himself, or by giving her an adequate allowance in money with which to purchase them; and that, having done this, he is not liable to tradesmen who, without his authority, furnish her with such necessaries.

The trial resulted in a verdict and judgment in favor of the plaintiffs for the full amount of their bill. The defendant by proper exceptions to the rulings, instructions to the jury, and refusal to instruct which we have recited, and by proper causes of reversal based thereon, now presents to this court for determination the question whether a husband may be held liable for goods purchased by his wife which come within the general description of necessaries, notwithstanding the fact that he himself furnishes her with moneys sufficient to purchase such necessaries as she and his children may from time to time reasonably require, and forbids her to pledge his credit for such purchases.

Although this precise question has not until now been presented to this court for decision, it has frequently received consideration in other tribunals, and the weight of authority supports the doctrine that a husband who is living with his wife, and who supplies her with necessaries suitable to his position and her own, or furnishes her with ready money with which to pay cash therefor, is not liable for the purchase price of other goods sold to her of the same character as necessaries, in the absence of affirmative proof of his prior authority to make such purchases. Baker v. Carter, 83 Me 132, 21 Atl. 834, 23 Am. St. Rep. 764; Bergh v. Warner, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362; Wanamaker v. Weaver, 176 N. Y. 75, 68 N. E. 135, 65 L. R. A. 529, 98 Am. St. Rep. 621; Jolly v. Rees, 15 C. B. (N. S.) 628; Debenham v. Mellon, 6 App. Cas. 24; Morel Bros. v. West Moreland, 1 K. B. (1903) 64. And this doctrine is, as we conceive, sound in principle.

(2) A wife has no power to make a contract binding upon her husband unless upon his authority express or implied. In cases where the authority is to be implied from the marital relationship and the cohabitation of the parties, the presumption which the law raises is based upon the obligation of the husband to supply necessaries to the wife. It may be that it is to be presumed that goods of the character of necessaries purchased by the wife on the credit of the husband are the very ones with which he was bound to supply her. But certainly this is not a presumption juris et de jure, and may be overcome by proof to the contrary. This duty which the law im-

poses upon the husband, and which he must discharge to the extent of his ability, is satisfied by a single performance. In other words, having once performed it, the law doest not impose upon him the obligation of duplicating that performance. When he has supplied his wife with those necessaries which their station in life and his financial standing entitle her to have at his hands, or has furnished her with moneys sufficient to enable her to purchase them for herself, he is under no obligation to pay bills incurred by her for what would have been necessaries if he had not already supplied her therewith, but which are not, in fact, such, because of the precedent supply. The husband may permit such extravagance on the part of the wife if he sees fit; but, having discharged the obligation which the law imposes upon him with relation to his wife's necessaries, he is entitled to regulate her expenditures, for which he is to become responsible, by his own discretion and judgment.

(3) It is argued that the tradesman is entitled to assume that the wife has authority to pledge the credit of her husband for necessaries, unless he receives notice to the contrary. This may be conceded when the husband, by his conduct, has led the tradesman to believe that the wife has such authority. But there seems no ground for such assumption on the part of the tradesman who deals with the wife for the first time. He is supposed to know that the wife's power to pledge her husband's credit is not without limit, that she can only do so for the purpose of obtainig those necessaries which the law requires him to furnish her, and to the extent that they remain unfurnished, and he can readily ascertain by inquiry the fact of the wife's authority to pledge her husband's credit for the purchases which she desires to make. The suggestion that such action on the part of the tradesman might readily be considered offensive, not only by the wife who seeks to make the purchases, but by the husband whose credit she seeks to pledge, is fully answered by what was said by Bramwell, L. J., in Debenham v. Mellon, supra, viz: "If it be said that such a proceeding would offend the customer, I answer that that may be an excellent reason why the tradesman should not ask the question; but it is no reason for seeking to make the husband pay because the question is not asked."

We conclude that the grounds of appeal which we have set out in the beginning of this opinion are well taken. The judgment under review will be reversed, and a venire de novo awarded.

WHITE, J., dissents.

Note—*Burden of Proof on Creditor Supplying Wife With Necessaries Purchased by Her.*—The instant case seems supported by the great weight of authority, but decision is far from showing with any reasonable certainty the dividing line between questions of law and questions of fact when it is to be determined what are necessaries. It seems to be admitted that a husband has some right to prescribe his style of living, and the opinion of others shall not too freely invade this right. Nevertheless, he cannot restrict creditors to the furnishing of bare necessities. The cases we submit show how difficult it is to formulate a rule on this subject.

In Menschke v. Riley, 159 Mo. App. 329, 140 S. W. 639, the court goes on the theory that there is no *"presumption"* of the authority of a wife living with her husband to bind him for necessaries and her purchase in his name only binds him where he fails to supply them himself. In this case there was a first sale or credit by a merchant, the husband having published notice that she could not contract bills in his name, but having made arrangements for her to get necessaries at certain stores. The published notice had not been seen by the plaintiff.

The case next, *supra*, was by Kansas City Court of Appeals, and Johnson v. Briscoe, 104 Mo. App. 493, 79 S. W. 498 was by St. Louis Court of Appeals, and it concerned a purchase of a particular article on credit from a merchant from whom household supplies had been bought by the wife on husband's credit and by him paid for. Judge Goode, after citation of many cases, he says: "The better decisions declare the law to be that when husband and wife are living together, with the family relation undisturbed, and he is making such provision as excites no comment among their friends and no complaint from her, the question of her right to pledge his credit for any purchase, depends on her actual or ostensible authority, and is to be determined by the rules of the law of agency." This was said to be the English rule as laid down in Debenham v. Mellon, 6 App. Cas. 24, with which American cases are in accord. Passing from agency as covering the particular purchase, it was said that even if necessaries are sold her, the husband may disprove her authority to purchase by showing he has made suitable provision for her.

In Eder v. Grifka, 149 Wis. 606, 136 N. W. 154, it was held that a complaint which fails to state special circumstances under which necessaries are furnished a wife is insufficient because: "A husband is not *ipso facto* liable for all necessaries which may be furnished his wife. It is only under circumstances and conditions showing a necessity that they be furnished by others, such as his misconduct compelling her to leave him and their home, his willful refusal to provide for her, or his deserting her, that the husband is liable for them. Since the special circumstances and conditions creating such a liability are essential to a cause of action for such a claim, they must be alleged to constitute a good complaint in such an action."

This case seems somewhat difficult to reconcile with Clark v. Tenneson, 146 Wis. 65, 130 N. W.

895, where it was held that a married woman was presumed to have purchased artificial teeth as "necessaries," making the husband liable, and an action against her was held not maintainable. Taking the later case, *supra*, recovery could not be against the husband unless the plaintiff alleged and proved the special circumstances and conditions of the teeth being furnished. The court assumes, in the earlier case, husband's liability unless plaintiff could show assumption of liability by the wife. This case cites Wannamaker v. Weaver, 176 N. Y. 75, 68 N. E. 135, 65 L. R. A. 529, 98 Am. St. Rep. 621, "for cases defining authority of the wife to obtain 'necessaries' charged to the husband, and under what circumstances he will be exempt from the obligation to pay for them."

In Wannamaker v. Weaver, *supra*, it is laid down as a general principle that a husband is not bound to pay for necessaries furnished to his wife with whom he is living upon any theory of implied agency where she is amply supplied with articles of the same character as those purchased or was furnished with ready money with which to pay cash for them. The court may have assumed, or it may have come out in evidence in the case next *supra* considered, that the wife neither had been supplied with artificial teeth or ready money to pay therefor, but at all events, this was an article as to whose necessity the wife's judgment was deemed sufficient whether the husband may have so regarded the matter or not.

The Wannamaker case is a very extensive discussion and to the conclusion, Parker, C. J., dissents. It is said that: "In general, while the spouses live together, a husband who supplies his wife with necessaries suitable to her position and his own is not liable to others for debts contracted by her on such an account without his previous authority." See also 10 Cent. L. J. 341; 54 id. 472. It is said this rule "compels the husband to pay in a proper case and at the same time affords him some protection against the seductive wiles exerted by tradesmen to induce extravagant wives to purchase that which they really do not need. * * * If a wife is going to a merchant to trade, with whom she is acquainted, and with whom she has been accustomed to trade upon the credit of her husband, she may still continue to do so until the husband gives notice prohibiting the merchant from longer giving credit to her. But when she goes to a stranger with whom she has never traded before, and where, consequently, there is no implied authority on the part of the husband to give her credit, it is but reasonable and proper that she disclose to the merchant authority therefor, or for the merchant to request such disclosure." As we understand this, a stranger is precisely on the footing of anyone forbidden to give her credit—he cannot recover unless he proves that he sold necessaries and that the husband had refused to supply them.

What are necessaries seems to be those things suitable to their circumstances. McGrath v. Donnelly, 131 Pa. 540, 20 Atl. 382; Atkins v. Curwood, 7 Car. & P. 756; Phillips v. Sanchez, 35 Fla. 187, 17 So. 363; Bergh v. Warner, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362; Raynes v. Bennet, 114 Mass. 424.

But these circumstances are those in which the husband chooses to live. Vusler v. Cox, 53 N. J. L. 518, 22 Atl. 347. Thus it was said that the fact that a husband wears diamonds and keeps a fast horse is competent testimony in determining whether articles purchased by his wife on his credit should be considered necessaries suitable to his style of life. Raynes v. Bennett, *supra*. Is the converse true that if he is a rich miser, spending nothing on himself or on his appearance or his abode, that her credit should be held down accordingly? The subject seems much mixed and the lines are faintly drawn between what are and what are not necessaries which the wife has the right to buy in the same way and by the same authority as she has to purchase bare necessities. The Wannamaker case is not only annotated very extensively in the L. R. A. *supra*, but also in Am. St. Rep. *supra*, and the two annotations may well be studied in comparison one with the other.

The cases in general principle go upon the right of a wife to protection against a husband's neglect of duty to her or his family, but at the same time it may well be surmised, that a stranger supplying necessaries would be more liberally treated by the courts, than one furnishing necessaries in the face of a notice forbidding credit to be extended to the wife—the latter possibly being protected only where humanity would so dictate. C.

ITEMS OF PROFESSIONAL INTEREST.

WHAT GOVERNORS AND ATTORNEYS GENERAL HAVE TO SAY ABOUT OUR ISSUE ON UNIFORM STATE LAWS.

In the first issue of volume 75 of the Central Law Journal, issued July 5, 1912, we devoted considerable space, editorially and by leading articles to the subject of the work of the Commissioners on Uniform State Laws. A great demand for this issue—larger than we could meet—immediately arose even from without the United States.

But what interested more than this was the enthusiastic endorsement of men in high official station of the work of the Commission and the conversion of many of them to the idea that the Commission work is especially valuable because of the careful drafting of the laws which emerge from its mature deliberations.

We append hereto a few letters which show the result of our efforts in behalf of the work of this great commission. We publish these letters at this time because, as we go to press, this great commission is now in session at Montreal under the presidency of Charles Thaddeus Terry of New York.

From Arizona:

Editor Central Law Journal:

I have read with great interest your editorial on the work of the commissioners on Uniform State Laws, and have found it to be an excellent exposition of the public services which these commissioners are rendering. I think that you are quite right in your belief that the continued work in behalf of uniform legislation in the different states of the Union has already

had a very salutary effect and will result in much greater benefit in the course of time.

You are doubtless aware that the First State Legislature of Arizona authorized me to appoint three commissioners on Uniform State Laws. The names and addresses of these men are as follows:

Hon. M. G. Cunniff, Crown King, Arizona;
Hon. A. A. Worsley, Tucson, Arizona; and
Hon. William B. Cleary, Bisbee, Arizona.

The high character of these commissioners is in thorough accord with the recommendations which you make in your editorial. Mr. Cunniff is president of our State Senate; Mr. Worsley is an attorney and a member of the Senate, while Mr. Cleary is one of our most progressive and eminent attorneys-at-law.

It is my earnest personal belief that one of the greatest advantages derived from uniformity of legislation is the safeguard thus afforded to the public by decreasing to a minimum the amount of independent construction and interpretation of laws that will devolve upon the individual judges of our country. This factor should go far toward insuring impartial dispensation of justice to every man or woman who has business before the courts.

Wishing you continued success in your work, I am

Yours very truly,
GEO. W. P. HUNT,
Governor of Arizona.

From Connecticut:

Editor Central Law Journal:

I am glad that you have thus called attention to one of the most useful of American organizations. I have watched the course of the conference of Commissioners on Uniform State Laws since its inception. Connecticut was represented in it from the first, and has been one of the few states that have made substantial contributions towards the necessary expenses of its work.

Your criticisms of modern legislation on the ground of undue haste in its enactment seem to me just. If a statute is to last, it must be simple, clear, plain. The various draft laws prepared by the conference of commissioners from year to year have been carefully thought out, and in general are models for American law-makers to follow, in drafting our statute law.

Yours very truly,
SIMEON E. BALDWIN.

From North Dakota:

Editor Central Law Journal:

I have read carefully your editorial of July 5, 1912, discussing what the commissioners on uniform laws are doing for the people of the United States, and while it is a short, concise and comprehensive statement of the work that is being done it also contains many valuable suggestions on the subject of legislation.

Your suggestion that every legislature should provide commissioners to represent its state, which commission should be regarded as an integral part of every state legislature and whose recommendations should be regarded with favor, is especially valuable. With such a commission to pass upon the form and the language of legislation before its introduction many conflicts and much litigation would be avoided.

Very truly yours,
JOHN BURKE,
Governor.

From Massachusetts:

Editor of the Central Law Journal:

I am directed by the Governor to acknowledge receipt of your letter of July 24, and also the copy of the Central Law Journal, which you so kindly sent him, devoted particularly to Uniform Legislation.

He is extremely interested in this matter, and called it to the attention of the Massachusetts General Court in his last inaugural, stating that this Commonwealth had already adopted a greater number of the proposed uniform statutes than any other state, having already ratified seven of such statutes, including a uniform negotiable instruments law, a uniform warehouse receipts act and a uniform sales act, with other important business laws—and recommending that this principle of uniform legislation be rapidly extended to a wide range of matters affecting the general welfare.

The Governor heartily endorses the eidtorial on this subject which appears in your publication, and trusts that it may be the means,—through the various commissioners on uniformity of legislation appointed from the various states—of greatly awakening the interest in this important question.

Yours very truly,
DUDLEY M. HOLMAN,
Sec'y. to the Governor.

From Alabama:

Editor Central Law Journal:

I have read with a great deal of interest the editorial in your issue of July 5, 1912.

The work being done by the commission on uniform state laws is one of the most important matters to the bar and the people of this country at the present time. I say this advisedly, for at this time when public sentiment is demanding legislative reform, and the reform of the criminal law and the procedure of the courts by the legislature, so many important but ill-considered and undigested acts are passed by the various legislatures that they really defeat the purpose which they were intended to promote.

If a state legislature can be prevailed upon to make some appropriation, or even appoint a commission to serve without pay, this would be a potential influence in securing favorable consideration of the work of the commission by the legislature, and would do much to remove the impression which prevails with many legislators, erroneous and harmful though it be, that they must watch the work of the lawyers in framing legislation and view it with suspicion.

Yours truly,
ROBERT C. BRICKELL,
Attorney General.

From New Mexico:

Editor Central Law Journal:

I take pleasure in saying that I think the editorial in your issue of July 5, 1912, summarizes the work of the Commissioners on Uniform State Laws and indicates the high character and nature of that work in a very satisfactory way, and if it could be forced upon the attention of every member of every state legislature I believe it would accomplish much good. The practical difficulty in such matters is not, I believe, so much in the hostility of legislators as in their indifference and lack of information. I think if that editorial could be printed in convenient form for distribution and a considerable

supply sent to each state to be used with the members of the legislature, and to each state bar association, it might have a stimulating and beneficial effect.

Very truly yours,
FRANK W. CLANCY,
Attorney General.

From New York:

Editor Central Law Journal:

I beg to advise you of the receipt of the copy of the Central Law Journal for July 5, 1912, containing articles on the work of the Commissioners on Uniform State Laws. The receipt of this issue is greatly appreciated, as it is one of the subjects which Governor Dix urged before the Conference of Governors at Spring Lake, last summer. We would be glad to receive copies of future issues of your paper containing articles along similar lines.

Respectfully,
ECKFORD C. DeKAY,
Military Secretary to the Governor.

From Vermont:

Editor Central Law Journal:

The copy of the Central Law Journal of July 6th came this morning, and I wish to assure you I am thoroughly in interest in the subject of your article on Uniform State Laws. We are doing everything within reasonable limits to induce our people to take a strong advanced position on this subject. We shall send a good delegation to Milwaukee and one which will include some of our very best men.

With high regards and congratulating you upon your efforts, I remain,

Yours very truly,
JOHN A. MEAD.

Rutland, Vt.

BOOKS RECEIVED

The Supreme Court of the United States, with a review of certain decisions relating to its appellate power under the Constitution, by Edwin Countryman. Price, $2.50, Albany, New York. Matthew Bender & Co. Review will follow.

A Treatise on the Law of Estoppel or of Incontestable Rights, by Melville M. Bigelow. Sixth Edition, revised by James N. Carter, Ph. B., J. M. Price, $6.50 net. Boston, Mass., Little, Brown and Company. Review will follow.

The Principles of Judicial Proof as Given by Logic, Phychology and General Experience and Illustrated in Judicial Trials. Compiled by John Henry Wigmore, Professor of the Law of Evidence in Northwestern University. Price, $6.00 net. Boston, Mass. Ltlie, Brown and Company. Review will follow.

American Annotated Cases containing the cases of general value and authority subsequent to those contained in American Decisions, American Reports and the American State Reports. Thoroughly Annotated Volume Ann. Cas. 1913C. Price, $5.00. Edward Thompson Co. Northport, L. I., N. Y. and Bancroft-Whitney Co., San Francisco, Cal. Review will follow.

BOOK REVIEWS.

FULLER'S ACCIDENT AND EMPLOYERS' LIABILITY INSURANCE.

This work, in one volume, by Mr. Herbert Bruce Fuller, A. M. LL. M., of Cleveland, Ohio, bar, is a very full and careful exposition of the law as shown in the cases which are used by the author. It is not, however, as readily usable as it might be were it divided into sections.

The table of contents assists, but should the paging there used have been extended to chapter headings, this would have been an advantage. The index, however, helps out the objection we have noted, this being quite full and well arranged.

The author quotes very abundantly from decision and the text and full notes thereto obviate often all necessity of resort to cases in the reports, and the logical sequence in which they appear helps very greatly to their better employment by practitioners.

All the references are to cases as they appear in all the reports, official, reporter system and selective series with their annotation. The work, therefore, is eminently practical, and the slight defect we have noticed may be well pardoned.

The volume is bound in law buckram, of typographical excellence and comes from the Vernon Law Book Company, Kansas City, Mo., 1913.

HUMOR OF THE LAW.

"Who presents people at court, pop?"

"In this country, my son, it is generally done by the grand jury."—Baltimore American.

Lawyer—'Your honor, I ask the dismissal of my client on the ground that the warrant fails to state that he hit Bill Jones with malicious intent."

Rural Judge—"This court ain't a graduate of none of your technical schools. I don't care what he hit him with. The p'int is, did he hit him? Perceed."

"What's the matter?" asked the lawyer's friend. "Been in a railroad accident?"

"No. I had a jury case the other day, and I argued so eloquently for the purpose of making it appear that my client was a fool instead of a knave that I got him acquitted on that plea."

"What has that to do with your appearance?"

"He met me outside, after court had adjourned."

"Meester liar, I bote some land of Gunder Larson and I vant a mortgage."

"A mortgage!" asked the lawyer in astonishment.

"Yah, yah."

"No, no," replied the lawyer. "You want a deed."

"No, no," insisted the simple Swede. "I vant no deet. I bote land from Pader Paderson sum yahr ago and got a deet and anoder fellar coom long mit a mortgage and took the lant, so I dink a mortgage bin besser than a deet."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Attorney and Client**—Relationship.—The relation of attorney and client with reference to money collected by the attorney is not that of debtor and creditor, but of principal and agent. —Wolfe v. Mack, 142 N. Y. Supp. 433.

2. **Brokers**—Defective Title.—Where a broker employed to procure an exchange of property procured a third person who made a contract for exchange, but who could not perform, for want of title or defective title, the broker had not earned commissions.—Connor v. Riggins, Cal., 132 Pac. 849.

3. **Bankruptcy**—Fraud.—Where a lessee subletting the premises for the entire term at an increased rent induced the landlord to execute a new lease to a third person to transfer the additional rent to the third person, who conspired with the lessee to defraud his creditors, the trustee in bankruptcy of the lessee was entitled to a decree securing to him the additional rent. —Lyon v. Moore, Ill., 102. N. E. 179.

4.——Preference.—Payment of a depositor's notes given to a bank by checks drawn on his deposit account within four months before bankruptcy of the depositor is not a preference forbidden by Bankr. Act July 1, 1898.—Studley v. Boylston Nat. Bank of Boston, 33, Sup. Ct. Rep. 806.

5. **Banks and Banking**—Checks.—Where an employe presented fictitious bills under the name of W. to his employer, approved them, and on the faith of his approval checks were drawn to the order of W., which the employe indorsed in that name and had cashed, the bank held entitled to charge the checks against the employer's account; they having been paid to the person intended.—Hartford v. Greenwich Bank of City of New York, 142 N. Y. Supp. 387.

6.——Checks.—A bank is under no obligation to a payee to pay a check, being only answerable to the depositor for its refusal to pay. —Columbia-Knickerbocker Trust Co. v. Miller, 142 N. Y. Supp. 440.

7.——Depositor.—An entry of a deposit in a depositor's passbook is only prima facie evidence of a deposit of the amount subject to be checked upon.—Southwest Nat. Bank of Kansas City v. House, Mo. 157 S. W. 809.

8. **Bastards**—Legitimacy.—A husband is presumed to be the father of his wife's child, if he had access to his wife within the required period, and non-intercourse must be established beyond reasonable doubt, or the presumption applies.—Timmann v. Timmann, 142 N. Y. Supp. 298.

9. **Bills and Notes**—Accommodation Indorser. —Where an accommodation indorser makes the discounting of a note at a particular bank a condition of its delivery to the payee, the payee has no right to use the note, except subject to that condition, Senft v. Schaefler, 142 N. Y. Supp. 380.

10.——Assignment.—Assignment on a separate paper of a partial interest in a mortgage on real property does not negotiate the instrument or debt secured thereby so as to render the transferee a holder in due course within Negotiable Instruments Law.—Offstein v. Weygandt, Kan. 132 Pac. 991.

11.——Consideration.—Where a materialman having no personal claim against a lessor for repairs made by lessee agrees with the lessor to accept his note in lieu of the lien, and thereafter files a statement based on the note and without any statement of account, in violation of the agreement of the note became invalid for failure of consideration.—Long-Bell Lumber Co. v. McCray Band Co., Kan. 132 Pac. 992.

12.——Installments.—In the absence of provisions to that effect, the entire debt evidenced by a note payable in installments is not matured, so as to be payable at once, by failure to make certain of the payments when due.—Llewellyn Iron Works v. Littlefield, Wash. 132 Pac. 867.

13.——Negotiability.—A letter reciting a promise to pay the balance of an insurance premium held not a negotiable instrument, not containing any promise to pay the addressee, who was the general agent of the insurer.—Equitable Trust Co. of New York v. Harger, Ill. 102 N. E. 209.

14. **Carriers of Goods**—Connecting Carrier.—Where goods shipped over connecting railway lines were destroyed at a junction point after the bills of lading were transferred to the connecting carrier, but the cars had not been accepted and inspected by it, the initial carrier is liable under the provision of the bill of lading that only the carrier in whose possession the goods were shall be liable.—Farnsworth-Evans Co. v. Chicago, M. & G. R. Co., Tenn. 157 S. W. 897.

15.——Draft on Consignee.—A bank which has advanced money to the consignor of grain and taken as security therefor a draft on the consignee, attached to the bill of lading, is entitled to the grain, as against an attachment in a suit by the consignee against the consignor.—A. J. Poor Grain Co. v. Franke Grain Co., Mo. 157 S. W. 840.

16. **Chattel Mortgage**—Release of Lien.—Cancellation of note secured by chattel mortgage at maturity and execution of new note with personal security for the unpaid balance held not a release of the lien as to the unpaid balance as against a subsequent mortagee.—Keelin v. Postlewait Co., Ill. 102 N. E. 205.

17. **Commerce**—Employer Liability Act.—The right of action for the death of a servant engaged in building a coal chute for an interstate carrier who was run down and killed by an engine in the carrier's yards is not governed by the provisions of the Interstate Commerce Act.—Voris v. Chicago, M. & St. P. Ry. Co. Mo. 157 S. W. 835.

18.——Interference.—Rev. St. 1909, § 3330, requiring telegraph companies receiving a message for transmission to forward it promptly on penalty, held a valid exercise of state power which could not be said to be an interference with interstate commerce nor to give extraterritorial effect to a state law.—Hewitt v. Western Union Telegraph Co., Mo. 157 S. W. 827.

19.——Intoxicating Liquors.—The fact that Ky. St. § 2569a, punishing the bringing into local option territory intoxicating liquors, has been adjudged inoperative when applied to interstate shipments protected by the commerce clause of the federal Constitution does not prevent it from becoming operative to a transaction withdrawn from the protection of the commerce clause by the Webb-Kenyon Act.—Adams Express Co. v. Commonwealth, Ky. 157 S. W. 908.

20. **Contempt**—Suit Pending.—A newspaper article published pending a divorce, stating that the lawyers' fees must be collected before alimony is paid and before the wife can dismiss the case, and reciting that the circuit judge allowed three attorneys' fees before he would dismiss the case upon the wife's motion, and that in a similar proceeding treretofore the judge had permitted the lawyer to decide whether alimony or the lawyer's fee would be paid, and allowed the fee on the lawyer's decision, held contemptuous.—Ex parte Nelson, Mo. 157 S. W. 794.

21. **Contracts**—Executory.—A party to an executory contract containing mutually dependent covenants cannot recover for a breach without alleging and proving performance by him, or showing some excuse for not performing.—Daniels v. Morris, Ore. 132 P. 958.

22.——Mutuality.—A promise by defendant to repurchase certain corporate stock from plaintiff within a reasonable time if she should not realize thereon, in order to induce her to purchase the same, on which plaintiff acted and failed to realize, held not objectionable for want of mutuality of obligation.—Lynch v. Murphy, 142 N. Y. Supp. 373.

23.——Pleading.—Where plaintiff alleges an oral contract on which he seeks to recover, he will not be permitted to recover on proof of a contract in writing.—Wabash R. Co. v. Grate, Ind. 192 N. E. 155.

24.——Preventing Performance.—Where one party to a contract interferes with or prevents its performance by the adverse party to an extent amounting to a refusal of performance, the latter may recover as if he had fully performed.—Holden v. Lyons, Mo. 157 S. W. 811.

25. **Conversion**—Equitable.—Where testator merely directs that his executors sell his land and divide the proceeds among his children, no equitable conversion into personalty results, but each child upon testator's death becomes the owner of a portion of the land.—Smith v. Hensen, Kan. 132 P. 997.

26. **Corporations**—Burden of Proof.—Where a person in substantial control of a corporation resigns his office, disposes of his stock, and then acquires by transfer to himself all of the corporate assets, he has the burden of proving that every step in the transaction was unobjectionable, and that the creditors were not injured.—Littman v. Harris, 142 N. Y. Supp. 341.

27.——"Fly Power."—A "fly-power" is a written assignment in the form generally used on the reverse of stock certificates, which, when signed and attached to such certificate, transfers the same in like manner as an indorsement thereon.—Carlisle v. Norris, 142 N. Y. Supp. 393.

28. **Courts**—Jurisdiction.—Where a note provides that a certain amount shall be added as attorney fees in case the note is not paid at maturity, such fees are included in determining the jurisdictional amount.—Humphrey v. Coquillard Wagon Works, Okla. 132 Pac. 899.

29. **Covenants**—Breach.—A lien created by operation of law, and not by the vendor's act after the execution of the contract of sale and before the execution of the deed, is not covered by covenants of warranty, but if the lien has attached when the vendee acquires the property, and he conveys by warranty deed with the lien unsatisfied, his covenants of warranty embrace the lien.—Kimberlin v. Templeton, Ind., 102 N. E. 160.

30. **Criminal Law**—Attempt.—An "attempt" to commit a crime is an effort or endeavor to accomplish the crime, more than mere preparation or planning, which if not prevented would have resulted in full consummation of the attempted act, but which in fact does not bring to pass the party's ultimate design.—State v. Davidson, Mo., 157 S. W. 890.

31.——Circulation of Libel.—One residing without the state who publishes a libel against a citizen of this state and who circulates it within the state is punishable herein, though he may also be subject to prosecution in some other state.—State v. Piver, Wash., Pac. 858.

32.——Dying Declarations.—An instruction that declarations made by decedent of sound mind and fully impressed with the belief that he would die, are entitled to the same weight as if made under sanction of an oath is erroneous; the weight to be given to a dying declaration being for the jury.—People v. Warren, Ill., 102 N. E. 201.

33.——Expert Testimony.—An expert may testify, in a prosecution for crime, as to experiments made under circumstances as nearly like those in the concrete case as possible.—State v. Bass, Mo., 157 S. W. 782.

34.——Jeopardy.—The commencement of a trial on a charge of burglary in which trial the information was quashed, if jeopardy attached, was not a bar to a subsequent prosecution for larceny growing out of the same transaction, which is a separate offense.—Ex parte Gano, Kan., 132 Pac. 999.

35.——Procurement of Evidence.—While it was not wholly commendable to procure evidence to support a prosecution for unlawfully selling cocaine by having a police officer give money to a state's witness to make the purchase, such course is sometimes permissible; though the method of procuring the evidence may be considered by the jury and trial court in weighing it.—Niswonger v. State, Ind., 102 N. E. 135.

36.——Silence.—An admission or confession may be implied from the conduct of a person in remaining silent when charged with a crime or complicity therein, or when statements are made by third persons in his presence affecting him, when the circumstances afford him an opportunity to act or speak in reply, and men similarly situated would naturally deny the guilt imputed or make explanations as to the statements.—People v. Tielke, Ill., 102 N. E. 229.

37. **Curtesy**—Debts of Wife.—Credit not having been extended to the husband for expenses of the wife's last illness and funeral, but rather to her estate, the husband's interest in the proceeds of his wife's real estate was not subject to deduction therefor.—Shirley v. Lambert, Ind., 102 N. E. 150.

38. **Damages**—Interest.—No interest is recoverable on a claim for unliquidated damages until the amount of the damages is made certain by judgment.—Kitchin v. Oregon Nursery Co., Ore., 132 Pac. 956.

39. **Dedication**—Implied.—An implied dedication of land for a public highway may arise by operation of law from the acts of the owner and exist without an express grant or evidence by any form of words, oral or written.—Township Board of Tripletts Tp. ex. rel. Feltz v. McPherson, Mo., 157 S. W. 857.

40. **Deeds**—Delivery.—In the absence of proof to the contrary, it will be presumed that a deed was delivered on the day it bears date, though acknowledged on a later date, unless the acknowledgment is essential to its validity.—Calligan v. Calligan, Ill., 102 N. E. 247.

41. **Divorce**—Alimony.—It is within the sole power of the circuit court, by decree entered prior to perfecting of an appeal, to award alimony in a divorce suit pending appeal, and such power does not rest in the apellate court.—Creasey v. Creasey, Mo., 157 S. W. 862.

43. **Ejectment**—Right of Possession.—Ejectment is a possessory action, and plaintiff to recover must have such an interest in the premises as entitles him to the present possession, and a remainderman entitled to the fee may not maintain ejectment during the outstanding life estate.—Whitham v. Ellsworth, Ill., 102 N. E. 223.

43. **Eminent Domain**—Measure of Damages.—Where a railroad, in condemning a right of way, cuts a tract of land so that the operation of trains increases the danger of injury to stock, such act is not an element of damage, but may be considered with other inconveniences in determining the value of the land taken.—Wichita Falls & N. W. Ry. Co. v. Munsell, Okla., 132 P. 906.

44. **Eminent Domain**—Oil Lands.—Where a railroad condemned a right of way over oil land, acquiring only an easement, the jury were properly instructed to assess the value of the land taken, deducting only special benefits to the land not taken that the owner would enjoy peculiar to his land.—Oil Belt Ry. Co. v. Lewis, Ill., 102 N. E. 228.

45. **Equity**—Sworn Answer.—A sworn answer responsive to the bill must be overcome by evidence of two witnesses or evidence of one witness corroborated by circumstances.—

Campbell v. Northwest Eckington Imp. Co., 33 Sup. Ct. Rep. 796.

46. **Estoppel**—Prior Mortgage.—A chattel mortagee was not estopped, by its representations to a subsequent mortagee that the mortgagor was keeping up the payments on the secured notes, to deny such payments or to assert a lien therefor, where the second mortagee extended no additional credit to the mortagor and did not change his attitude or course of conduct in any respect on account of such representations.—eKelin v. Postlewait Co., Ill., 102 N. E. 205.

47. **Evidence**—Admissibility.—On the issue whether a deed to a son was a gift or an advancement, subsequent statements of the grantor are admissible if they tend to show his purpose.—Martin v. Shumway, Kan., 132 P. 993.

48.——Recital of Consideration.—The rule that a written contract may not be changed by proof of a contemporaneous parol agreement is subject to the exception that the statement of the consideration in the contract, unless contractual, may **be impeached by** parol evidence.—Wabash R. Co. v. Grate, Ind., N. E. 155.

49. **Fraud**—Pledge.—A pawnbroker, who negligently issues a ticket for a diamond ring, where the stone is not genuine, is not liable for fraud to one who bought the pawn ticket and afterwards redeemed the ring.—Feingold v. I. Wisenberger Co., 142 N. Y. Supp. 319.

50. **Fraudulent Conveyances**—Notice of Fraud.—Though a transfer is fraudulent as against the creditors, an innocent purchaser from the grantee for a sufficient consideration, without notice of the fraud, is protected.—Lyon v. Moore, Ill., 102 N. E. 179.

51. **Homestead**—Sale of.—Where a son owned the equitable title to certain land, the legal title to which was in his father, and occupied it as his homestead, the son's title could not be affected by a lease to the father, by which the son agreed to surrender possession at the expiration of the term, in which his wife did not join.—Holland v. Holland, Kan., 132 P. 989.

52. **Homicide**—Bringing on Fight.—Where defendant provokes a difficulty that he may have a pretext for killing or inflicting serious injury, and he does kill deceased, he is guilty of murder, however hard he may have been pressed in the conflict, unless he in good faith has abandoned it.—Moultry v. State, Okla., 132 P. 915.

53.——Corpus Delicti.—In a prosecution for homicide, the "corpus delicti" consists in the proof that the deceased died from the effects of a wound, and that the wound was unlawfully inflicted by accused.—State v. Bass, Mo., 157 S. W. 782.

54.——Dying Declarations.—Where decedent fatally shot was informed by his physician that he could not recover and he expected death almost immediately, but hoped to live long enough to see his parents, his statements were properly received as dying declarations.—People v. Warren, Ill., 102 N. E. 201.

55.——Motive.—Where accused's agency or participation in a murder is otherwise sufficiently established, want of motive is immaterial, but where evidence of guilt is circumstantial, motive may be essential to support a conviction.—State v. Concelia, Mo., 157 S. W. 778.

56.——Self Defense.—Self-defense is available, though there was no actual danger, if, when threatened with danger, one acted on honest conviction reasonably induced under all circumstaces.—State v. Tribett, Wash., 132 P. 875.

57. **Injunction**—Specific Performance.—Where a son has supported his father for years on a contract that he was to become at once the owner of certain land, the legal title to be vested in him at his father's death, and the son in reliance thereon improved the land and performed services, the value of which could not be readily estimated, he was entitled to enjoin his father from executing a deed to the land to a third person.—Holland v. Holland, Kan., 132 P. 989.

58. **Insurance**—Automobiles.—An automobile, insured for damages caused solely by collision with another object, the policy excluding damages from striking any portion of the roadbed, on being driven down a roadway skidded, so that the rear wheels were thrust across a granitoid guttering and a grass plat, against a sidewalk. Held, the guttering and sidewalk were not a portion of the roadbed within the meaning of the policy sued on.—Stix v. Travelers' Indemnity Co. of Hartford, Conn., Mo., 157 S. W. 870.

59.——Beneficiary.—A married man, having a living undivorced wife, cannot, under and by laws of a mutual benefit association, authorizing the affianced wife of the member to be designated as beneficiary, lawfully designate his certificate to a woman not his wife as his fiancee.—Mendelson v. Gausman, 142 N. Y. Supp. 293.

60.——By-Laws.—The by-laws of a fraternal benefit association providing for the suspension of a member upon nonpayment of dues are not waived by statements of an officer of a subordinate lodge that the lodge should pay insured's dues, in the absence of a showing of a general custom to that effect known and acquiesced in by the governing officers of the order.—Knode v. Modern Woodmen of America, Mo., 157 S. W. 818.

61.—Indemnity.—A judgment against a city, employing a sewer contractor in favor of a pedestrian injured by the negligent failure to guard open sewer trenches is binding on the contractor and his insurer against loss, though they were not parties, but defended the action, and establishes the liability of the insurer to the contractor liable to the city on the judgment.—Kibler v. Maryland Casualty Co., Wash., 132 P. 878.

62.——Oral Contract.—A contract of insurance can be effected by parol, and in the absence of any requirement in the by-laws or charter of a mutual insurance company, or of any statutory provision its oral contract of insurance which leaves nothing to be done but to issue and deliver the policy, is valid.—State Mut. Fire Ins. Co. v. Taylor, Tex., 157 S. W. 950.

63.—Place of Contract.—Where an insurance contract is negotiated, the premiums paid, and the policy delivered in the state in which the insured resides, the policy is to be construed according to the laws of that state.—Coscarella v. Metropolitan Life Ins. Co., Mo., 157 S. W. 873.

64. **Interest**—Vexatious Delay.—Where there had been a vexatious delay in the payment of the amount due under a contract, interest was properly allowed from the date when such amount was due.—Guynn v. Daugherty, Ind., 102 N. E. 147.

65. **Judgment**—Former Term.—The court has no authority to set aside, upon motion, a judgment rendered at a former term against parties who were not served.—Matthews v. Stephenson, Mo., 157 S. W. 887.

66. **Judgment**—Res Judicata.—A memorandum opinion of the trial judge is not a finding of facts under the statute, and is not available as res judicata on the matters herein referred to.—Flanagan v. Lazerine, Mo., 157 S. W. 824.

67. **Landlord and Tenant**—Assignment.—Where a lease provided that the tenant's right to recover a deposit to secure performance should not be assignable, an assignment of the lease with the landlord's consent did not pass to the assignee the right to recover the deposit on the termination of the lease.—Wertheimer v. Marks, 142 N. Y. Supp. 331.

68.——Implied Leasing.—While the relation of landlord and tenant arises only by agreement, such an agreement may ordinarily be implied from the fact that the person entitled to the premises voluntarily allows another to enter into possession.—Hershkopf v. Engel, 142 N. Y. Supp. 344.

69.——Misrepresentation. — Where defendant, in leasing a building, had ample opportunity to examine the same and discover the falsity of certain alleged representation made by plaintiff as to the condition of the premises and contemplated improvements, he was not entitled to rely thereon and be released from the lease because of their falsity.—Creamer v. Peshkin, 142 N. Y. Supp. 333.

70.——Notice to Quit.—A tenant from month to month under a monthly rental, who receives 30 days' notice to quit or to continue in possession under an increased rental, and who on the 1st day of the month after the expiration of the 30 days tenders the rental under the original tenancy, and dissents from the landlord's demand for additional rent, does not impliedly consent to a new lease at an increased rental.—Flanagan v. Lazerine, Mo., 157 S. W. 824.

71.——Repossession.—Where a tenant, having paid rent to the end of the term, removed before the term expired, but did not surrender the premises, the landlord's entry to redecorate the premises during the term was a willful trespass, and rendered her liable for the proportionate amount of the rent paid for such period.—Hellenberg v. Schmidt, 142 N. Y. Supp. 330.

72.——Subletting.—A subletting of the premises for the entire term at an increased rental is an assignment of the lease, and the sublessee, as assignee, is liable to the landlord for the rent specified in the lease, and the lessee has a contract right to the additional rent.—Lyon v. Moore, Ill., 102 N. E. 179.

73. **Libel and Slander**—Privilege.—Communications made to a prosecuting officer by several persons charged with criminal libel are not privileged where made in furtherance of a conspiracy to commit an indictable offense.—State v. Wilcox, Kan., 132 Pac. 982.

74. **Licenses**—Police Power.—The state may, in the exercise of the police power, regulate professions, and demand that persons engaging in profession shall possess a certain degree of skill and learning, as determined by an examination by a board authorized to require an examination and issue a license.—Klafter v. State Board of Examiners of Architects, Ill., 102 N. E. 193.

75. **Limitation of Actions**—Change of Party.—If, after a widow has brought an action for the death of her husband, she is appointed administratix and amends the petition, her action as administratrix is not barred by the two-year statute of limitations.—Mott v. Long, Kan., 132 Pac. 998.

76. **Malicious Prosecution.**—Probable Cause.—In actions for malicious prosecution, the failure of the proceedings against plaintiff is not evidence of want of probable cause, and, if no conclusion can be drawn from the evidence except that he was guilty of the crime charged, probable cause is shown as a matter of law, notwithstanding his discharge.—Harris v. Quincy, O. & K. C. R. Co., Mo., 157 S. W. 893.

77. **Master and Servant**—Assumption of Risk.—A servant who proceeds in obedience to an order, even without a promise to repair, does not, as a rule, assume the risk of unnecessary danger caused by the master's negligence.—Lamoon v. Smith Cement Brick Co., Wash., 132 Pac. 880.

78.——Course of Employment.—A locomotive engineer who had been ordered to take a defective locomotive to a shop, but who instead undertook to go in it to his dinner, is not a vice principal as to a brakeman riding to dinner with him, and killed by the overturning of the locomotive.—Gardstrom v. L. E. White Lumber Co., Cal., 132 Pac. 842.

79.——Fellow Servant.—Where a mine boss directed a driver to go into an entry with his cars and remove material, and directed employes to move a water car, used to sprinkle the tracks and entries, the negligence of such employe in failing to place the water car a sufficient distance away from the track, by reason of which a collision occurred, injuring the driver, was not the negligence of fellow servants for which the driver could not recover.—Loescher v. Consolidated Coal Co., Ill., 102 N. E. 196.

80.——Incompetent Servant.—A master must use due care in engaging servants who are reasonably fit and competent for the performance of the duties assigned them; the rule requiring the exercise of ordinary care, such as men of reasonable prudence observe.—Simplex Ry. Appliance Co. v. Kamaredt, Ind., 102 N. E. 129.

81.——Incompetent Servant.—In a servant's action for injuries because of the master's negligence in the employment of an incompetent fellow servant, the plaintiff had the burden of proving that his injury was the proximate result of the unfitness of such fellow servant, and that in employing him the master knew, or with ordinary care should have known, of such unfitness.—Simplex Ry. Appliance Co. v. Kameradt, Ind., 102 N. E. 129.

82.——Statutory Violation.—A negligent violation of a statute or municipal ordinance defining reasonable care on the part of a master in the operation of agencies that may inflict injury if not properly used is negligence per se.—Miles v. Central Coal & Coke Co., Mo., 157 S. W. 867.

83.——Vice-Principal.—Where plaintiff was directed by his foreman to assist in removing an iron plate from a car, the foreman owed him the duty to refrain from placing him in a position of danger without giving him direct and explicit warning, and such duty was not performed by the foreman's signal of safety, given from a distance of 150 feet, and which might have been intended to initiate some other switching movement.—Hogan v. Crane Co., Ill., 102 N. E. 215.

84. **Mechanics' Lien**—Bond of Contractor.—The liability of a contractor for materials supplied for the work but not actually used is within the contractor's bond conditioned on payment of materialmen furnishing materials for the work; the contractor not reserving the right to return any material not used.—Crane Co. v. United States Fidelity & Guaranty Co., Wash., 132 Pac. 872.

85.——Lessee.—Where a short term lease authorizes the lessee to repair at his own expense, the improvements to remain permanent fixtures, it makes the lessee so far as the agent of the lessor as to entitle persons furnishing labor or material under the contract with the lessee to a lien.—Long-Bell Lumber Co. v. McCray Band Co., Kan., 132 Pac. 992.

86.——Trust Deed.—Where summons against the holder of a trust deed is issued, in an action to foreclose a mechanic's lien, after judgment has been rendered against the owners upon confession, the suit against the holder is not a separate suit.—Matthews v. Stephenson, Mo., 157 S. W. 887.

87. **Monopolies**—Anti-Trust Act.—There is no such vagueness in the Anti-Trust Act of July 2, 1890, as to render it inoperative on its criminal side, because only such combinations are within the act as by reason of intent or the inherent nature of the act prejudice the public interests.—Nash v. United States, 33 Sup. Ct. Rep. 780.

88. **Money Received**—Following Money.—Money wrongfully obtained and received by another in good faith in the usual course of business and in partial liquidation of an actually existing indebtedness cannot be followed by the one from whom it has been obtained from the fraud of a third person.—Carlisle v. Norris, 142 N. Y. Supp. 393.

89. **Negligence**—Last Clear Chance.—Where a person, whether a wrongdoer or not, is placed in a position of peril by an instrumentality operated by another, it is the duty of the latter under the humanitarian rule when he sees or could see the danger, and has the means of averting it, to use all reasonable means to that end.—Rowe v. Hammond, Mo., 157 S. W. 880.

90.——Licensees.—Where a storekeeper maintains an opening in the floor of a passageway used by customers, it is his duty to exercise care in respect to the opening commensurate with the danger involved, and, where the door was negligently left open and a patron fell through, the only defense possible is that of contributory negligence.—Beckermann v. E. H. Kortkamp Jewelry Co., Mo., 157 S. W. 855.

91. **Parent and Child**—Habeas Corpus.—The paramount consideration in determining custody is the interest and welfare of the child, but the father being the natural guardian, it will be awarded him unless he is shown incompetent, or it be demonstrated that the welfare

of the child demands a different disposition.—Walker v. Finney, Tex., 157 S. W. 948.

92. **Partnership**—Elements of.—An agreement between the owners of unimproved property and a builder, in consideration of his assistance in improving and marketing the property to give him an undivided third interest therein, creates a partnership as to the developing and marketing of the property.—Campbell v. Northwest Eckington Imp. Co., 33 Sup. Ct. Rep. 796.

93.——Joint and Several Liability.—A partner's liability for the tort of another partner or a servant of the firm is both joint and several.—Rogers v. Ponet, Cal., 132 Pac. 851.

94. **Payment**—Accord and Satisfaction.—Where chattels are delivered in full settlement of a liquidated amount and no valuation is fixed or agreed upon, the act constitutes an accord and satisfaction and not a payment.—First Nat. Bank v. Latham, Okla., 132 Pac. 891.

95. **Principal and Agent**—Agency.—Where a lessee was injured by the fall of plaster in an apartment, she cannot recover on the theory of misrepresentations by the lessor because the janitor in charge informed her that the ceiling had been fixed and that there was no danger; his statement that it had been repaired being true, and the observation as to the danger being a mere opinion.—Renard v. Grenthal, 142 N. Y. Supp. 328.

96.——Agency.—A salesman of a corporation, has power to sign checks and attend to routine business, did not have implied power to execute a lease of real property for his principal.—Harris v. Raskin, 142 N. Y. Supp. 342.

97. **Reformation of Instruments**—Mistake.—To secure the reformation of a deed on the ground of mistake, the mistake must be in the terms of the deed and not in the contract, and it must also be mutual and not unilateral.—Robinson v. Korns, Mo., 157 S. W. 790.

98. **Release**—Joint Tortfeasors.—An instrument executed by a person sustaining a personal injury inflicted by joint wrongdoers whereby he agrees to dismiss the suit against one of them, and not to reinstitute it, and to hold him harmless from all liability, is a covenant not to sue, and is not a satisfaction of the liability of the other wrongdoer.—Smith v. Dixie Park & Amusement Co., Tenn., 157 S. W. 900.

99. **Sales**—On Approval.—Where a sale is made subject to approval, it suffices to defeat the sale that the buyer rejects the goods as unsatisfactory for any reason or for no good reason.—Henley-Waite Music Co. v. Gramiss, Mo., 157 S. W. 817.

100. **Specific Performance**—Laches.—A contract for sale, in the nature of an option, not definitely fixing time for performance, demand should be in a reasonable time, so that, not being within eight years, specific performance is properly denied.—Heydrick v. Dickey, Ky., 157 S. W. 915.

101. **Street Railroads**—Last Clear Chance.—Street car company held liable for pedestrian's injuries under the last clear chance doctrine, even though the pedestrian's negligence continued to the instant of his injury.—Indiana Union Traction Co. v. Kraemer, Ind., 101 N. E. 141.

102. **Sunday**—Injunction.—A judge of the superior court of Cook county, authorized to grant writs of injunction, must determine whether a bill for an injunction and affidavit are sufficient to authorize the issuance of an injunction on Sunday.—People v. McWeeney, Ill., 102 N. E. 233.

103. **Trusts**—Appointing Trustees.—A court of chancery may appoint a trustee to carry out the terms of a testamentary trust, where the will makes no provision for a successor in the trust, and the trustee appointed refuses to act.—Roberts v. Roberts, Ill., 102 N. E. 239.

104.——Appointing Trustee.—If a corporation appointed as trustee by a will cannot act, because organized under an unconstitutional statute, the court will execute the trust or appoint some person capable of acting.—Dean v. Northern Trust Co., Ill., 102 N. E. 244.

105.——Reselling Trust.—Where the purchaser who pays the consideration for a tract of land has the conveyance made to another, a trust results in his favor, even though the grantee had no knowledge of the conveyance.—Froemke v. Marks, Ill., 102 N. E. 192.

106.——Resulting Trust.—A resulting trust arises in favor of one who pays the purchase money or some definite part of it at the time the deed is taken in the name of another; it does not arise from any contract or agreement by the parties, but is created by an implication of law from the two facts of payment of the purchase money by one and conveyance of the title thereby purchased to another.—Metropolitan Trust & Savings Bank v. Perry, Ill., 102 N. E. 218.

107. **Usury**—Personal Defense.—The defense of usury is personal to the debtor or borrower, and his privies by law, blood, contract, or estate, and may not be set up by a stranger.—Jones v. Bryan, Ind., 102 N. E. 153.

108. **Vendor and Purchaser**—Bond for Title.—Under a bond agreeing to convey upon the vendee making payments in the time and manner specified in the bond, no right of possession being given the vendee, the vendee acquires no interest or title in the land until the payments were made as specified.—Gall v. Stoll, Ill., 102 N. E. 225.

109.——Option.—A contract by which defendants sell and bind themselves to convey land to plaintiff, without any corresponding obligation on his part to take and pay for it, he, by its terms, having the right at any time to surrender it on payment of $10 and forfeiture of the original $100 cash payment, is in the nature of an option, so that time is of essence of the contract.—Heydrick v. Dickey, Ky., 157 S. W. 915.

110.——Rescission.—A vendor's right to rescind a contract which authorized such rescission for any default of the purchaser in the payment of taxes, interest, etc., or in the making of improvements, was not affected by the fact that it was indebted to the purchaser in an amount exceeding that due on the contract, where it disputed the indebtedness and did not agree to apply it on the contract, the contract provided for payment in "lawful money," and the purchaser was also in default in making the improvements.—Benham v. Columbia Canal Co., Wash., 132 Pac. 884.

111. **Wills**—Attesting Witnesses.—Where one of the two attesting witnesses of a will testified that he had no recollection of signing his name to the instrument and so could not say that he saw testator sign or that he knew it to be his will, the probate court properly refused to admit it to probate.—Kaul v. Lyman, Ill., 102 N. E. 212.

112.——Construction.—As a rule, a specific provision of a will prevails over a general provision in case of doubt.—Board of Administration v. Stead, Ill., 102 N. E. 173.

113.——Gift to a Class.—A "gift to a class" is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or in some other definite proportions; the share of each being dependent for its amount upon the ultimate number.—In re Sandhusen, 142 N. Y. Supp. 469.

114.——Intention.—Where testator's attempt to carry out his intentions through the creation of a trust has failed, a similar legal estate will, in so far as possible, be substituted for the equitable estate attempted to be created.—In re Bleckwehl's Will, 142 N. Y. Supp. 449.

115.——Lost Will.—To establish a lost or destroyed will, the evidence of its execution and contents must be clear, positive, free from bias, and convincing beyond a reasonable doubt.—Cole v. McClure, Ohio, 102 N. E. 264.

116.——Powers.—Where a testatrix devised property to a nephew to be distributed by him among her heirs, including himself, according to his own discretion, the will creates a power coupled with a trust for the benefit of the heirs.—Wetmore v. Henry, Ill., 102 N. E. 189.